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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TAD A. STRANGE,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No. EDCV 15-843-KK

MEMORANDUM & ORDER

Plaintiff Tad A. Strange (“Plaintiff”) seeks review of the final decision of the Commissioner of the Social Security Administration (“Commissioner” or “Agency”) denying his applications for Title II Disability Insurance Benefits (“DIB”) and Title XVI Supplemental Security Income (“SSI”). The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge, pursuant to Title 28 of the United States Code, section 636(c). For the reasons stated below, the Commissioner’s decision is REVERSED and this action is REMANDED for further proceedings consistent with this Order.

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I.

PROCEDURAL HISTORY

On January 31, 2012, Plaintiff filed applications for DIB and SSI, alleging a disability onset date of December 1, 2011. Administrative Record (“AR”) at 178. Plaintiff’s applications were denied initially on October 3, 2012, and upon reconsideration on March 5, 2013. Id. at 109, 116.

On April 4, 2013, Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). See id. at 35, 126. On October 11, 2013, ALJ Mark B. Greenberg held a hearing at which Plaintiff appeared with counsel and testified. Id. at 46. A vocational expert (“VE”) also testified at the hearing. Id.

On November 6, 2013¹, the ALJ issued a decision denying Plaintiff’s applications for DIB and SSI. Id. at 43. On January 17, 2014, Plaintiff filed a request for the Agency’s Appeals Council to review the ALJ’s decision. Id. at 31. On March 9, 2015, the Appeals Council denied Plaintiff’s request for review. Id. at 1.

On April 29, 2015, Plaintiff filed the instant action. Dkt. 1. This matter is before the Court on the parties’ Joint Stipulation (“JS”), filed January 7, 2016, which the Court has taken under submission without oral argument. Dkt. 16.

II.

BACKGROUND

Plaintiff was born on June 16, 1960, and his alleged disability onset date is December 1, 2011. AR at 178, 197. He was fifty-one years old on the alleged disability onset date and fifty-three years old at the time of the hearing before the ALJ. Id.

¹ The Court accepts this date because the ALJ dated his Notice of Decision and decision November 6, 2013. AR at 32, 43. However, the Court notes the record contains documents in which Plaintiff asserts November 25, 2013 as the decision date. Id. at 9-10; see also ECF Docket No. (“Dkt.”) 16, Joint Stipulation at 2. The parties do not raise the date of the ALJ’s decision and the issue is not relevant to the claim presented. Dkt. 16. Thus, the Court declines to address it.

1 Plaintiff has a twelfth grade education, and prior work history as a prefabrication
 2 manager, tool and equipment manager, electrician, foreman, leadman, and owner and
 3 operator of a retail sporting goods store. Id. at 202-03, 219. Plaintiff alleges disability
 4 based on neck pain, lower back pain, arthritis in his hips, chest pain, migraines, leg pain,
 5 and heart problems. Id. at 201.

6 III.

7 **STANDARD FOR EVALUATING DISABILITY**

8 To qualify for DIB or SSI, a claimant must demonstrate a medically determinable
 9 physical or mental impairment that prevents him from engaging in substantial gainful
 10 activity, and that is expected to result in death or to last for a continuous period of at least
 11 twelve months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998). The impairment
 12 must render the claimant incapable of performing the work he previously performed and
 13 incapable of performing any other substantial gainful employment that exists in the
 14 national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999).

15 To decide if a claimant is disabled, and therefore entitled to benefits, an ALJ
 16 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

- 17 (1) Is the claimant presently engaged in substantial gainful activity? If so, the
 18 claimant is found not disabled. If not, proceed to step two.
- 19 (2) Is the claimant's impairment severe? If not, the claimant is found not
 20 disabled. If so, proceed to step three.
- 21 (3) Does the claimant's impairment meet or equal one of the specific
 22 impairments described in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so,
 23 the claimant is found disabled. If not, proceed to step four.²

24
 25 ² "Between steps three and four, the ALJ must, as an intermediate step, assess the
 26 claimant's [residual functional capacity]." Bray v. Comm'r of Soc. Sec. Admin., 554
 27 F.3d 1219, 1222-23 (9th Cir. 2009) (citing 20 C.F.R. § 416.920(e)). In determining a
 28 claimant's residual functional capacity, an ALJ must consider all relevant evidence in the
 record. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006).

1 (4) Is the claimant capable of performing work he has done in the past? If so,
2 the claimant is found not disabled. If not, proceed to step five.

3 (5) Is the claimant able to do any other work? If not, the claimant is found
4 disabled. If so, the claimant is found not disabled.

5 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d 949, 953-54
6 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-(g)(1), 416.920(b)-(g)(1).

7 The claimant has the burden of proof at steps one through four, and the
8 Commissioner has the burden of proof at step five. Bustamante, 262 F.3d at 953-54.
9 Additionally, the ALJ has an affirmative duty to assist the claimant in developing the
10 record at every step of the inquiry. Id. at 954. If, at step four, the claimant meets his
11 burden of establishing an inability to perform past work, the Commissioner must show
12 that the claimant can perform some other work that exists in “significant numbers” in the
13 national economy, taking into account the claimant’s residual functional capacity
14 (“RFC”), age, education, and work experience. Tackett, 180 F.3d at 1098, 1100;
15 Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

16 IV.

17 THE ALJ’S DECISION

18 A. STEP ONE

19 At step one, the ALJ found Plaintiff “has not engaged in substantial gainful activity
20 since December 1, 2011, the alleged onset date” of disability. AR at 37 (citations
21 omitted).

22 B. STEP TWO

23 At step two, the ALJ found Plaintiff had the “following severe impairments:
24 degenerative disc disease; degenerative joint disease; obesity; coronary artery disease;
25 hypertension; and headaches.” Id. (citations omitted).

26 C. STEP THREE

27 At step three, the ALJ found Plaintiff “d[id] not have an impairment or
28 combination of impairments that meets or medically equals the severity of one of the

1 listed impairments in 20 CFR Part 404, Subpart R, Appendix 1.” Id. at 38 (citations
2 omitted).

3 **D. RFC DETERMINATION**

4 The ALJ found Plaintiff had the following RFC:

5 to perform light work as defined in 20 CFR 404.1567(b) except the claimant
6 is limited to occasional postural activities; he cannot climb ladders, ropes or
7 scaffolds; he must avoid concentrated exposure to cold, vibrations or
8 hazards.

9 Id.

10 **E. STEP FOUR**

11 At step four, the ALJ found Plaintiff was “capable of performing past relevant
12 work as a manager. This work does not require the performance of work-related
13 activities precluded by [Plaintiff]’s residual functional capacity.” Id. at 41 (citations
14 omitted). Accordingly, the ALJ found Plaintiff “has not been under a disability, as
15 defined in the Social Security Act, from December 1, 2011” and ended his analysis. Id.
16 at 43.

17 **V.**

18 **PLAINTIFF’S CLAIM**

19 Plaintiff presents one disputed issue: whether the ALJ properly considered
20 Plaintiff’s subjective symptom testimony. JS at 4.

21 **VI.**

22 **STANDARD OF REVIEW**

23 Pursuant to Title 42 of the United States Code, section 405(g), a district court may
24 review the Commissioner’s decision to deny benefits. The ALJ’s findings and decision
25 should be upheld if they are free of legal error and supported by substantial evidence
26 based on the record as a whole. Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420,
27 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007).

28 “Substantial evidence” is evidence that a reasonable person might accept as

adequate to support a conclusion. Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla but less than a preponderance. Id. To determine whether substantial evidence supports a finding, the reviewing court “must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion.” Reddick, 157 F.3d at 720; see also Hill v. Astrue, 698 F.3d 1153, 1159 (9th Cir. 2012) (stating a reviewing court “may not affirm simply by isolating a specific quantum of supporting evidence” (citations and internal quotation marks omitted)). “If the evidence can reasonably support either affirming or reversing,” the reviewing court “may not substitute its judgment” for that of the Commissioner. Reddick, 157 F.3d at 720-21; see also Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012) (“Even when the evidence is susceptible to more than one rational interpretation, we must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.”).

The Court may review only the reasons stated by the ALJ in her decision “and may not affirm the ALJ on a ground upon which he did not rely.” Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007). If the ALJ erred, the error may only be considered harmless if it is “clear from the record” that the error was “inconsequential to the ultimate nondisability determination.” Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (citation and internal quotation marks omitted).

VII.

RELEVANT FACTS

A. PLAINTIFF’S MEDICAL TREATMENT

Plaintiff received medical treatment from March 23, 2011 to April 18, 2014. On March 23, 2011, Medical Doctor, Doctor of Philosophy, and Fellow of American College of Surgeons Clifford C. Douglas examined Plaintiff, noting despite having heart surgery, Plaintiff had coronary artery disease” and “significant back pain.” AR at 291.

On April 19, 2011, Dr. Douglas operated on Plaintiff’s back. Id. at 282. Dr. Douglas gave Plaintiff preoperative and postoperative diagnoses of lumbosacral

1 spendylosis with foraminal stenosis and intractable low back pain with radioculopathy
2 Id.

3 On July 18, 2011, Dr. Douglas examined Plaintiff. Id. at 290. Dr. Douglas stated
4 Plaintiff “complain[ed] of continued groin and back pain unchanged from
5 preoperatively.” Id. Dr. Douglas further stated Plaintiff had “persistent achy pain, which
6 ke[pt] him awake at night.” Id.

7 On September 12, 2011, Dr. Douglas again examined Plaintiff. Id. at 288. Dr.
8 Douglas stated after Plaintiff “had two X-STOP devices placed for indirect lumbar
9 decompression and stabilization . . . [Plaintiff] continue[d] . . . to complain of lower
10 extremity pain, which is quite severe.” Id. Dr. Douglas opined “[i]t truly d[id] appear as
11 if [Plaintiff] [wa]s suffering from a radiculitis.” Id.

12 On September 27, 2011, Medical Doctor Rainier Guiang examined Plaintiff. Id. at
13 335. Dr. Guiang noted despite “multiple injections and cervical Radiofrequency ablation
14 procedures done over the last 15 years,” Plaintiff “complain[ed] of both neck and back
15 pain.” Id.

16 On November 15, 2011, Dr. Guiang operated on Plaintiff’s neck and spine. Id. at
17 311. Dr. Guiang noted despite neck and lumbar surgery, Plaintiff “continue[d] to have
18 neck pain.” Id.

19 On December 6, 2011, Dr. Guiang examined Plaintiff and noted Plaintiff
20 “complain[ed] of both back and neck pain.” Id. at 339. Dr. Guiang also noted Plaintiff:
21 (1) did not feel “any significant difference after surgery”; (2) described his “pain as dull,
22 aching, burning, cramping, tingling, pins and needles, and shooting”; and (3) had back
23 and leg pain that was “continuous and rated as 8/10 in severity.” Id. Dr. Guiang further
24 opined epidural injections afforded Plaintiff “excellent however temporary relief,” but
25 Dr. Guiang “d[id] not think further injections would help.” Id.

26 On April 12, 2012, Dr. Guiang again examined Plaintiff. Id. at 341. Dr. Guiang
27 noted Plaintiff “complain[ed] of both neck and back pain,” and prior epidural injections
28 “gave short term relief.” Id.

1 On September 24, 2012, Doctor of Osteopathic Medicine Vicente R. Bernabe
 2 performed an Orthopaedic Consultation of Plaintiff. Id. at 428-33. Dr. Bernabe noted
 3 Plaintiff “continue[d] to have pain” in his neck. Id. at 429. Dr. Bernabe stated Plaintiff’s
 4 medications included: Diovan, Plavix, Hydrochlorothiazide, Aspirin, Ranexa,
 5 Simvastatin, Fenofibrate, Metoprolol, Amlodipine, Hydrocodone, and Gabapentin. Id.
 6 In addition, Dr. Bernabe diagnosed Plaintiff with degenerative disc disease of the lumbar
 7 spine, status post anterior cervical discectomy and fusion, status post lumbar discectomy
 8 and disc replacement, and cervical and lumbar musculoligamentous strain. Id. at 432.

9 On October 31, 2012, Doctor of Osteopathic Medicine Harold Jackson examined
 10 Plaintiff. Id. at 531. Dr. Jackson noted Plaintiff “used to get bad migraines” for which he
 11 took Topamax. Id. Dr. Jackson also noted Plaintiff previously had two epidurals, which
 12 “helped maybe 30%.” Id.

13 On February 6, 2013, Dr. Douglas examined Plaintiff. Id. at 504. Dr. Douglas
 14 noted Plaintiff’s pain was not “a radicular pain, but rather an axial pain associated with
 15 the neck . . . [which] [s]ometimes result[ed] in headaches where [Plaintiff] felt like he
 16 [wa]s having a worsening in his migraines.” Id. at 504.

17 On April 18, 2014, Dr. Jackson completed a Physical Residual Functional Capacity
 18 Questionnaire. Id. at 582. Dr. Jackson identified as Plaintiff’s primary care physician
 19 and stated he treated Plaintiff monthly since January 6, 2011. Id. Dr. Jackson diagnosed
 20 Plaintiff with osteoarthritis, spine disease, and chronic pain syndrome with a prognosis of
 21 “[p]oor for improvement” and symptoms of back, hip, and neck pain. Id. at 582. Dr.
 22 Jackson noted Plaintiff’s treatment included “pain medication, epidural (failed)” and
 23 Plaintiff’s “pain or other symptoms [were] severe enough to interfere with attention and
 24 concentration . . . [c]onstantly.” Id. at 582-83. Dr. Jackson further noted Plaintiff: (1)
 25 had “significant limitations in doing repetitive reaching, handling or fingering”; (2) could
 26 not reach his arms overhead; and (3) would be absent from work “[m]ore than three
 27 time[s] a month” because of his impairment or treatment. Id. at 585-86.

28 **B. PLAINTIFF’S TESTIMONY**

1 At the hearing on October 11, 2013, Plaintiff testified about his pain, treatment,
2 daily activities, and restrictions. Id. at 50-63. With respect to pain, Plaintiff testified in
3 December 2011, he “developed some serious back problems” causing “pains down [his]
4 legs [and] nerve pains in [his] legs.” Id. at 50. Plaintiff testified he felt pain in both of
5 his legs “[c]onstantly” and “anything . . . cause[d] it,” including lying in bed, sitting,
6 lifting, and bending. Id. Plaintiff testified he had migraine headaches “[o]nce or twice a
7 month” for five to six hours, during which he constantly vomited. Id. at 62-63.

8 With respect to treatment, Plaintiff testified he has “done epidurals, nerve blocks,
9 nerve ablations and [was] taking medications and [was] up to oxycodone.” Id. at 51.
10 Plaintiff testified he had “a dozen nerve ablations in [his] neck.” Id. at 60. Plaintiff
11 further testified he took pain medications daily, which caused “[l]oopiness and
12 sleepiness.” Id. at 51. Plaintiff also testified: “maintaining a focus is a big problem I
13 have with the drugs I take.” Id. at 52.

14 With respect to daily activities, Plaintiff testified: “I don’t do much actually.” Id.
15 at 51. Plaintiff testified: “When I wash my hair in the shower, I cannot complete it
16 without having to put my arms down and rest.” Id. at 52. Plaintiff testified he did “some
17 laundry” and rinsed dishes to put in a dishwasher, but could not do any other household
18 chores. Id. Plaintiff also testified he abstained from “too much” yard work, his wife did
19 most yard work, and “a part time gardener . . . d[id] the heavy stuff.” Id. at 53. Plaintiff
20 further testified he had two sixty-pound dogs, which he took on separate walks daily for
21 fifteen minutes each, and watched the dogs play in his backyard. Id. at 52, 54. In
22 addition, Plaintiff testified his wife grocery shopped while he “just lean[ed] against the
23 cart and [went] with her.” Id. at 53. Plaintiff testified he visited swap meets “probably
24 twice a month” and he “usually stay[ed] around 45 minutes” each time. Id. at 59.

25 With respect to restrictions, Plaintiff testified he could neither lift more than twenty
26 pounds nor lift repetitively. Id. at 51-52. Plaintiff testified a doctor suggested he walk
27 with a cane and when he walked outdoors he used a cane “[m]ost of the time.” Id. at 61.
28 In addition, Plaintiff testified he could only sit for about fifteen to twenty minutes at a

1 time. Id. at 55.

2 Plaintiff testified on “a typical good day” he showered, walked around a swap meet
3 for forty-five minutes, rested at home, and ingested oxycodone. Id. at 58. Plaintiff also
4 testified he had “bad days” three days a week and “on a bad day . . . [he] just stay[ed] in
5 [his] pajamas and ha[d] a cup of coffee and [went] back to bed.” Id. at 57; see also id. at
6 59.

7 **C. VOCATIONAL EXPERT’S TESTIMONY**

8 The ALJ presented three hypothetical individuals to the VE. Id. at 67-75. The first
9 hypothetical individual could perform “light work; occasional postural activities; no
10 climbing of ladders, ropes, or scaffolds; no concentrated exposure to extreme cold,
11 vibration or hazards.” Id. at 67. The ALJ asked whether the individual could perform
12 Plaintiff’s past work and the VE stated the individual could work as a store manager “but
13 only per the DOT code, not as performed.” Id. The ALJ asked “what about the
14 owner/operator” job and the VE answered the individual “would be able to do the
15 owner/operator and the prefabrication manager.” Id. The ALJ asked “if for some reason,
16 based on that hypo the individual couldn’t do past work, would other work fit that hypo?”
17 Id. The VE answered the individual could work as a store manager, packer, housekeeper,
18 and bench assembler. Id. at 67-68.

19 The second hypothetical individual could perform “no overhead reaching; frequent
20 reaching in other directions.” Id. at 68. The ALJ asked whether “past work remain[ed]
21 available” and the VE answered “[b]oth managers of stores would be available. Both
22 manager occupations, the manager, industrial organization, and the store manager.” Id.

23 The third hypothetical individual had the following limitations:

24 lifting and carrying and pushing or pulling is limited to 10 pounds; standing
25 or walking limited to 45 minutes at one time for no more than three hours
26 total in an eight hour workday; sitting limited to 30 minutes at one [time];
27 use of a cane for prolonged ambulation over 45 minutes at one time; with no
28 balancing, no hazards, and no uneven terrain.

1 Id. at 68-69. The ALJ asked if the individual could perform Plaintiff's past work and the
 2 VE answered "I don't believe he could perform past relevant work." Id. at 69. The ALJ
 3 asked if the individual had "the stand/walk limited of three and the lift, carry, push, pull
 4 limit of 10, what kind of light work would there be?" Id. at 70. The VE answered the
 5 individual could work as a billing clerk and appointment clerk. Id. at 71.

6 In addition, Plaintiff's counsel asked the VE to consider: "If we were to take any of
 7 these hypotheticals and hypotheticals one, two, and three and add off task due to the
 8 effects of medication . . . 20 percent." Id. at 75. The VE stated: "Then in that instance
 9 they would not be able to perform competitive employment." Id. Plaintiff's counsel then
 10 asked if an individual could perform work with limitations "the same [as stated in prior]
 11 hypotheticals, but instead of stating it off task 20 percent of the time, missing work more
 12 than two days a month because of the pain or effects of medication." Id. The VE
 13 answered the individual "would not be able to sustain competitive employment." Id.

14 **D. ALJ'S ADVERSE CREDIBILITY FINDING**

15 In the decision dated November 6, 2013, the ALJ found Plaintiff's "medically
 16 determinable impairments could reasonably be expected to cause the alleged symptoms;
 17 however, [Plaintiff]'s statements concerning the intensity, persistence and limiting effects
 18 of these symptoms are not entirely credible." Id. at 39. In support of this finding, the
 19 ALJ cited: (1) purported improvements in Plaintiff's conditions; (2) Plaintiff's alleged
 20 conservative treatment; (3) purported mild to moderate medical findings; and (4) an
 21 alleged lack of prescribed restrictions. Id. at 39-41.

22 **VIII.**

23 **DISCUSSION**

24 If "the record establishes the existence of a medically determinable impairment that
 25 could reasonably give rise to the reported symptoms, an ALJ must make a finding as to
 26 the credibility of the claimant's statements about the symptoms and their functional
 27 effect." Robbins, 466 F.3d at 883 (citations omitted). The ALJ's credibility
 28 determination must be supported by "findings sufficiently specific to permit the court to

1 conclude that the ALJ did not arbitrarily discredit claimant's testimony." Tommasetti v.
 2 Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (citation and internal quotation marks
 3 omitted).

4 The ALJ is required to engage in a two-step analysis. "First, the ALJ must
 5 determine whether there is objective medical evidence of an underlying impairment
 6 which could reasonably be expected to produce the pain or other symptoms alleged."
 7 Molina, 674 F.3d at 1112 (citations and internal quotation marks omitted). "If the
 8 claimant has presented such evidence, and there is no evidence of malingering, then the
 9 ALJ must give specific, clear and convincing reasons in order to reject the claimant's
 10 testimony about the severity of the symptoms." Id. (citations and internal quotation
 11 marks omitted). "The ALJ must state specifically which symptom testimony is not
 12 credible and what facts in the record lead to that conclusion." Smolen v. Chater, 80 F.3d
 13 1273, 1284 (9th Cir. 1996); see also Brown-Hunter v. Colvin, 806 F.3d 487, 489 (9th Cir.
 14 2015) (holding "an ALJ does not provide specific, clear, and convincing reasons for
 15 rejecting a claimant's testimony by simply reciting the medical evidence in support of his
 16 or her residual functional capacity determination").

17 "If the ALJ's credibility finding is supported by substantial evidence, [a court] may
 18 not engage in second-guessing." Thomas v. Barnhart, 278 F.3d 947, 959 (9th Cir. 2002).
 19 However, an ALJ's failure to give specific, clear, and convincing reasons to reject the
 20 claimant's testimony about the severity of the symptoms is not harmless, because it
 21 precludes the Court from conducting a meaningful review of the ALJ's reasoning.
 22 Brown-Hunter, 806 F.3d at 489.

23 **A. THE ALJ IGNORED THE OVERALL DIAGNOSTIC RECORD**

24 The ALJ found Plaintiff less than credible based upon: (1) purported improvements
 25 in Plaintiff's conditions; (2) Plaintiff's alleged conservative treatment; (3) purported mild
 26 to moderate medical findings; and (4) an alleged lack of prescribed restrictions. AR at
 27 39-41. However, an ALJ must view a claimant's treatment records "in light of the overall
 28 diagnostic record," including where the records "consistently reveal that, despite some

occasional signs of improvement” the claimant continued to suffer from symptoms. Ghanim v. Colvin, 763 F.3d 1154, 1164 (9th Cir. 2013). In addition, the ALJ “has an independent duty to fully and fairly develop the record and to assure that the claimant’s interests are considered. . . . Ambiguous evidence, or the ALJ’s own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ’s duty to conduct an appropriate inquiry.” Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001) (internal citations and quotation marks omitted).

(1) The ALJ erroneously relied on purported improvements in Plaintiff’s conditions

Here, the overall diagnostic record demonstrates the ALJ erroneously relied on purported improvements in Plaintiff’s conditions. See Ghanim, 763 F.3d at 1164. First, the ALJ stated Plaintiff testified his migraines were “being managed effectively with a new medication.” AR at 39. However, Plaintiff testified medication helped his migraines, but he still had migraines “[o]nce or twice a month” for five to six hours, during which he constantly vomited. Id. at 62-63. Thus, the overall diagnostic record fails to demonstrate medication effectively managed Plaintiff’s migraines. See Ghanim, 763 F.3d at 1164.

Second, the ALJ stated Plaintiff had “undergone a series of neck and hip epidural injections with adequate but temporary relief.” AR at 39. However, temporary relief is not a valid reason to find Plaintiff less than credible, especially in light of the following medical records:

- On September 27, 2011, Dr. Guiang noted despite “multiple injections and cervical Radiofrequency ablation procedures done over the last 15 years,” Plaintiff “complain[ed] of both neck and back pain.” Id. at 335.
- On November 15, 2011, Dr. Guiang noted despite neck and lumbar surgery, Plaintiff “continue[d] to have neck pain.” Id. at 311.
- On December 6, 2011, Dr. Guiang noted Plaintiff again “complain[ed] of both back and neck pain.” Id. at 339. Dr. Guiang also noted Plaintiff: (1)

1 did not feel “any significant difference after surgery”; (2) described his “pain
2 as dull, aching, burning, cramping, tingling, pins and needles, and shooting”;
3 and (3) had back and leg pain that was “continuous and rated as 8/10 in
4 severity.” Id. Dr. Guiang further stated he “d[id] not think further injections
5 would help.” Id.

- 6 • On April 12, 2012, Dr. Guiang noted Plaintiff “complain[ed] of both neck
7 and back pain,” and prior epidural injections only “gave short term relief.”
8 Id. at 341.

9 Thus, the overall diagnostic record demonstrates surgeries and epidurals failed to
10 adequately address Plaintiff’s reoccurring pain. See Ghanim, 763 F.3d at 1164.

11 Third, the ALJ stated Plaintiff “denied pain, numbness or weakness in the upper
12 extremities” at a February 6, 2013 physical examination. AR at 40. However, in the
13 notes documenting that examination, Dr. Douglas stated Plaintiff’s pain was “an axial
14 pain associated with the neck . . . [which] [s]ometimes result[ed] in headaches where
15 [Plaintiff] felt like he [wa]s having a worsening in his migraines.” Id. at 504.

16 Additionally, in notes dated April 18, 2014, Dr. Jackson stated Plaintiff had “significant
17 limitations in doing repetitive reaching, handling or fingering,” could not reach his arms
18 overhead, and would be absent from work “[m]ore than three time[s] a month” because of
19 his impairment or treatment. Id. at 585-86. Thus, the overall diagnostic record
20 demonstrates axial pain and limitations in Plaintiff’s upper extremities persisted. See
21 Ghanim, 763 F.3d at 1164.

22 Therefore, the ALJ ignored evidence in the overall diagnostic record establishing
23 Plaintiff’s reoccurring pain and limitations. See id. To the extent the ALJ found
24 purported improvements in Plaintiff’s conditions ambiguous, the ALJ failed his duty to
25 conduct an appropriate inquiry. See Tonapetyan, 242 F.3d at 1150.

26 ///

27
28 **(2) The ALJ erroneously described Plaintiff’s treatment as**

conservative treatment

The overall diagnostic record shows the ALJ erroneously described Plaintiff's treatment as conservative treatment. See Ghanim, 763 F.3d at 1164. First, the ALJ stated Plaintiff "confirmed that the only treatment he [wa]s receiving [wa]s physical therapy and pain medication" for his back and neck pain. AR at 39. However, on April 19, 2011, Dr. Douglas operated on Plaintiff's back. Id. at 282. In addition, Plaintiff stated he has had "a dozen nerve ablations in [his] neck." Id. at 60. Further, on September 24, 2012, Dr. Bernabe stated Plaintiff's prescribed pain medications included narcotics Hydrocodone and Gabapentin. Id. at 429. The ALJ himself acknowledged Plaintiff had "undergone a series of neck . . . epidural injections." Id. at 39. Thus, the overall diagnostic record demonstrates treatment for Plaintiff's back and neck exceeded physical therapy and pain medication. See Ghanim, 763 F.3d at 1164.

Second, the ALJ stated Plaintiff "noted ongoing relief with cervical ablation and continued pain medications." AR at 40. However, on September 27, 2011, Dr. Guiang noted despite "multiple injections and cervical Radiofrequency ablation procedures done over the last 15 years," Plaintiff "complain[ed] of both neck and back pain." Id. at 335. Thus, the overall diagnostic record fails to demonstrate Plaintiff had ongoing relief, or Plaintiff's cervical ablations and pain medications constitute conservative treatment. See Ghanim, 763 F.3d at 1164.

Third, the ALJ stated "there is no indication that an assistive device was prescribed or medically necessary . . . [Plaintiff] remained on non-surgical management of his pain symptoms." AR at 40. However, Plaintiff stated a doctor suggested he walk with a cane and he walked outdoors with a cane "[m]ost of the time." Id. at 61. In addition, on April 19, 2011, Dr. Douglas operated on Plaintiff's back, which produced unchanged diagnoses. Id. at 282. Further, on July 18, 2011, Dr. Douglas stated Plaintiff had "persistent achy pain, which ke[pt] him awake at night." Id. at 290. Moreover, on November 15, 2011, Dr. Guiang operated on Plaintiff's neck and spine, which produced unchanged pain levels. Id. at 311. Thus, the overall diagnostic record does not support

1 the ALJ's statement that the record made "no indication an assistive advice was
2 prescribed or medically necessary," or Plaintiff "remained on non-surgical management
3 of his pain symptoms." See id. at 40; Ghanim, 763 F.3d at 1164.

4 Fourth, the ALJ stated Plaintiff's "symptoms were neuropathic in nature and
5 surgical intervention was not required." AR at 40. However, Plaintiff's doctors
6 frequently noted unsuccessful surgical attempts to control Plaintiff's pain, such as on July
7 18, 2011, when Dr. Douglas stated Plaintiff "complain[ed] of continued groin and back
8 pain unchanged from preoperatively." Id. at 290. Thus, the overall diagnostic record
9 fails to demonstrate surgical intervention would have addressed Plaintiff's symptoms or a
10 lack of required surgical intervention undermines Plaintiff's credibility. See Ghanim,
11 763 F.3d at 1164.

12 Fifth, the ALJ stated with respect to Plaintiff's musculoskeletal conditions,
13 "objective medical records indicate that [Plaintiff] has been treated for the conditions in a
14 conservative manner." AR at 41. However, medical records demonstrate doctors have
15 treated Plaintiff for his musculoskeletal conditions with surgery and narcotics as follows:

- 16 • On April 19, 2011, Dr. Douglas operated on Plaintiff's back. Id. at 282.
- 17 • On September 12, 2011, Dr. Douglas stated Plaintiff "had two X-STOP
18 devices placed for indirect lumbar decompression and stabilization." Id. at
19 288.
- 20 • On September 27, 2011, Dr. Guiang noted Plaintiff had "multiple injections
21 and cervical Radiofrequency ablation procedures done over the last 15
22 years." Id. at 335.
- 23 • On November 15, 2011, Dr. Guiang operated on Plaintiff's neck and spine.
24 Id. at 311.
- 25 • On September 24, 2012, Dr. Bernabe stated Plaintiff's medications included
26 Hydrocodone and Gabapentin. Id. at 429.

27 Thus, the overall diagnostic record fails to demonstrate conservative treatment for
28 Plaintiff's musculoskeletal conditions. See Ghanim, 763 F.3d at 1164.

1 Sixth, the ALJ stated Plaintiff “has been routinely management [sic] for
2 hypertension with antihypertensive medication and he has not been hospitalized for acute
3 chest pains and other cardiac symptoms.” AR at 40. However, on March 23, 2011, Dr.
4 Douglas noted that after Plaintiff had surgery to address his heart problems, Plaintiff still
5 “ha[d] coronary artery disease.” Id. at 291. In addition, on September 24, 2012, Dr.
6 Bernabe noted Plaintiff’s medications included Diovan, Plavix, Hydrochlorothiazide,
7 Aspirin, Ranexa, Simvastatin, Fenofibrate, Metoprolol, and Amlodipine. Id. at 429.
8 Thus, the overall diagnostic record fails to demonstrate routine or conservative
9 management of Plaintiff’s hypertension. See Ghanim, 763 F.3d at 1164.

10 Therefore, the ALJ ignored evidence in the overall diagnostic record demonstrating
11 Plaintiff’s treatment exceeded conservative treatment. See id. To the extent the ALJ
12 found the aggressiveness of Plaintiff’s treatment ambiguous, the ALJ failed his duty to
13 conduct an appropriate inquiry. See Tonapetyan, 242 F.3d at 1150.

14 **(3) The ALJ erroneously described Plaintiff’s medical findings as mild to**
15 **moderate**

16 The overall diagnostic record demonstrates the ALJ erroneously described
17 Plaintiff’s medical findings as mild to moderate. See Ghanim, 763 F.3d at 1164. First,
18 the ALJ stated in “April and May of 2012 . . . [Plaintiff] noted a mild to moderate level of
19 pain and ambulated with an antalgic gait during these visits.” AR at 39. However, on
20 December 6, 2011, Dr. Guiang noted Plaintiff had back and leg pain that was
21 “continuous and rated as 8/10 in severity.” Id. at 339. In addition, on April 18, 2014, Dr.
22 Jackson diagnosed Plaintiff with osteoarthritis, spine disease, and chronic pain syndrome
23 with a prognosis of “[p]oor for improvement” and symptoms of back, hip, and neck pain.
24 Id. at 582. Thus, the overall diagnostic record demonstrates the severity of Plaintiff’s
25 pain exceeded mild to moderate. See Ghanim, 763 F.3d at 1164.

26 Second, the ALJ noted Dr. Bernabe’s examination showed Plaintiff had only minor
27 limitations and Dr. Bernabe concluded Plaintiff “could perform a range of light work
28 with occasional postural and agility activities.” AR at 40. However, Dr. Bernabe’s

1 September 24, 2012 notes state Plaintiff “continue[d] to have pain” in his neck. Id. at
2 429. Dr. Bernabe also diagnosed Plaintiff with degenerative disc disease of the lumbar
3 spine, status post anterior cervical discectomy and fusion, status post lumbar discectomy
4 and disc replacement, and cervical and lumbar musculoligamentous strain. Id. at 432. In
5 addition, on April 18, 2014, Dr. Jackson stated Plaintiff’s “pain or other symptoms [were]
6 severe enough to interfere with attention and concentration . . . [c]onstantly.” Id. at 582-
7 83. Dr. Jackson further noted Plaintiff: (1) had “significant limitations in doing repetitive
8 reaching, handling or fingering”; (2) could not reach his arms overhead; and (3) would be
9 absent from work “[m]ore than three time[s] a month” because of his impairment or
10 treatment. Id. at 585-86. Thus, the overall diagnostic record fails to demonstrate
11 Plaintiff’s limitations were minor. See Ghanim, 763 F.3d at 1164.

12 Third, the ALJ noted “[a] bone scan failed to show evidence of psuedoarthrosis or
13 significant inflammatory spine disease.” AR at 40. In addition, the ALJ stated “X-ray
14 imaging of the lumbar spine showed that the stabilization objects were in proper position
15 and there was moderate facet of arthropathy at L5-S1.” Id. The ALJ further stated “[t]he
16 record does not show deficits in upper extremities.” Id. at 41. However, the following
17 medical records showed significant instability and deficits:

- 18 • On April 19, 2011, Dr. Douglas noted Plaintiff’s preoperative and
19 postoperative diagnoses as lumbosacral spendylosis with foraminal stenosis
20 and intractable low back pain with radioculopathy Id. at 282.
- 21 • On April 12, 2012, Dr. Guiang noted Plaintiff “complain[ed] of both neck
22 and back pain,” and prior epidural injections only “gave short term relief.”
23 Id. at 341.
- 24 • On April 18, 2014, Dr. Jackson diagnosed Plaintiff with osteoarthritis, spine
25 disease, and chronic pain syndrome with a prognosis of “[p]oor for
26 improvement” and symptoms of back, hip, and neck pain. Id. at 582. Dr.
27 Jackson noted Plaintiff’s treatment included “pain medication, epidural
28 (failed)” and Plaintiff’s “pain or other symptoms [were] severe enough to

1 interfere with attention and concentration . . . [c]onstantly.” Id. at 582-83.

2 Dr. Jackson further noted Plaintiff had “significant limitations in doing
3 repetitive reaching, handling or fingering,” could not reach his arms
4 overhead, and would be absent from work “[m]ore than three time[s] a
5 month” because of his impairment or treatment. Id. at 585-86.

6 Thus, the overall diagnostic record demonstrates instability and deficits in Plaintiff’s back
7 and upper extremities. See Ghanim, 763 F.3d at 1164.

8 Therefore, the ALJ ignored evidence in the overall diagnostic record demonstrating
9 medical findings exceeded mild to moderate levels. See id. To the extent the ALJ found
10 certain medical findings ambiguous, the ALJ failed his duty to conduct an appropriate
11 inquiry. See Tonapetyan, 242 F.3d at 1150.

12 **(4) The ALJ erroneously relied on an alleged lack of prescribed restrictions**

13 The overall diagnostic record shows the ALJ erroneously relied on an alleged lack
14 of prescribed restrictions. See Ghanim, 763 F.3d at 1164. The ALJ found “a review of
15 the record in this case reveals no restrictions recommended by the treating doctor.” AR
16 at 41. However, on April 18, 2014, Dr. Jackson identified as Plaintiff’s primary care
17 physician who treated Plaintiff monthly since January 6, 2011, and noted Plaintiff’s “pain
18 or other symptoms [were] severe enough to interfere with attention and concentration . . .
19 [c]onstantly.” Id. at 582-83. Dr. Jackson further noted Plaintiff had “significant
20 limitations in doing repetitive reaching, handling or fingering,” could not reach his arms
21 overhead, and would be absent from work “[m]ore than three time[s] a month” because of
22 his impairment or treatment. Id. at 585-86. Therefore, the ALJ ignored evidence in the
23 overall diagnostic record demonstrating indications of significant restrictions by
24 Plaintiff’s treating doctor. See Ghanim, 763 F.3d at 1164. To the extent the ALJ found
25 Dr. Jackson’s failure to more expressly order restrictions ambiguous, the ALJ failed his
26 duty to conduct an appropriate inquiry. See Tonapetyan, 242 F.3d at 1150.

27 Accordingly, the ALJ’s reliance on any purported: (1) improvements in Plaintiff’s
28 conditions; (2) conservative treatment; (3) mild to moderate medical findings; and (4)

1 lack of prescribed restrictions fails to provide specific, clear, and convincing reasons for
2 discrediting Plaintiff. See Brown-Hunter, 806 F.3d at 489.

3 **B. PLAINTIFF’S TESTIMONY SHOWS HIS DAILY ACTIVITIES ARE**
4 **MORE LIMITED THAN THE ALJ IMPLIED**

5 The ALJ found Plaintiff “described activities of daily living that are not limited to
6 the extent one would expect, given the complaint of disabling symptoms and limitations.”
7 AR at 39. However, reasons for discrediting a plaintiff that misstate the record
8 “provide[] no support for [an ALJ’s] credibility finding.” Lingenfelter, 504 F.3d at 1036;
9 see White v. Colvin, No. EDCV 13-1626-PLA, 2014 WL 4187823, at *7 (C.D. Cal. Aug.
10 21, 2014) (reversing and remanding ALJ’s decision based upon an adverse credibility
11 finding where “plaintiff’s testimony demonstrate[d] that her daily activities [we]re far
12 more limited than the ALJ implie[d]”).

13 Here, Plaintiff’s testimony demonstrates Plaintiff’s daily activities were more
14 limited than the ALJ implied. First, the ALJ stated Plaintiff testified “he is able to care
15 for his dogs.” AR at 39. However, Plaintiff merely testified he took his dogs on separate
16 walks daily for fifteen minutes each and watched the dogs play in his backyard. Id. at 52,
17 54. Second, the ALJ stated Plaintiff “could go to the swap meet about twice per month.”
18 Id. at 39. However, Plaintiff testified he visited swap meets “probably twice a month”
19 and he only “usually stay[ed] around 45 minutes” each time. Id. at 59. Third, the ALJ
20 stated Plaintiff could “do light chores at home.” Id. at 39. However, Plaintiff testified he
21 did “some laundry” and rinsed dishes to put in a dishwasher, but could not do any other
22 household chores. Id. at 52. Fourth, the ALJ stated Plaintiff could “shop for groceries
23 with his wife.” Id. at 39. However, Plaintiff testified his wife grocery shopped while he
24 “just lean[ed] against the cart and [went] with her.” Id. at 53.

25 Plaintiff’s further testimony demonstrates his daily activities were far more limited
26 than the ALJ implied. See White, 2014 WL 4187823, at *7. Examples of the limitations
27 in Plaintiff’s daily activities include:

- 28 • Plaintiff stated he could only sit for about fifteen to twenty minutes at a time.

1 AR at 55.

- 2 • Plaintiff stated on “a typical good day” he showered, walked around a swap
3 meet for forty-five minutes, rested at home, and ingested oxycodone. Id. at
4 58.
- 5 • Plaintiff stated he had “bad days” three days a week and “on a bad day . . .
6 [he] just stay[ed] in [his] pajamas and ha[d] a cup of coffee and [went] back
7 to bed.” Id. at 57.

8 The ALJ thus exaggerated Plaintiff’s testimony regarding his daily activities and
9 the ALJ’s misstatements “provide[] no support for [the ALJ’s] credibility finding.” See
10 Lingenfelter, 504 F.3d at 1036. Therefore, the ALJ’s discussion of Plaintiff’s daily
11 activities failed to provide specific, clear, and convincing reasons for discrediting
12 Plaintiff. See Brown-Hunter, 806 F.3d at 489.

13 **IX.**

14 **RELIEF**

15 “When an ALJ’s denial of benefits is not supported by the record, the proper
16 course, except in rare circumstances, is to remand to the agency for additional
17 investigation or explanation.” Hill, 698 F.3d at 1162 (citation and internal quotation
18 marks omitted). “We may exercise our discretion and direct an award of benefits where
19 no useful purpose would be served by further administrative proceedings and the record
20 has been thoroughly developed.” Id. (citation and internal quotation marks omitted).
21 “Remand for further proceedings is appropriate where there are outstanding issues that
22 must be resolved before a determination can be made, and it is not clear from the record
23 that the ALJ would be required to find the claimant disabled if all the evidence were
24 properly evaluated.” Id. (citations omitted); see also Reddick, 157 F.3d at 729 (“We do
25 not remand this case for further proceedings because it is clear from the administrative
26 record that Claimant is entitled to benefits.”).

27 In this case, the record has not been fully developed. The ALJ must reassess
28 Plaintiff’s limitations and their impact on the disability determination. Accordingly,

1 remand for further proceedings is appropriate.

2 **X.**

3 **ORDER**

4 For the foregoing reasons, IT IS ORDERED judgment be entered REVERSING
5 the decision of the Commissioner and REMANDING this action for further proceedings
6 consistent with this Order. IT IS FURTHER ORDERED the Clerk of the Court serve
7 copies of this Order and the Judgment on counsel for both parties.

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10 DATED: JANUARY 19, 2016

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12 _____
13 HONORABLE KENLY KIYA KATO
14 UNITED STATES MAGISTRATE JUDGE
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